SUPREME COURT, U. S.
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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1195

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

Petitioners,

—against—

MORTON EISEN,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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The essence of respondent's argument is that he must be allowed a right of immediate appeal from an order heretofore consistently held non-appealable, merely because of his threat that otherwise he will not pursue the action. To permit such an appeal would be contrary to the mandate of Congress expressed in 28 U. S. C. § 1291 and to the limitations of the "collateral order doctrine" laid down by this Court.

I

Uniform Standards of Appealability

Neither this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) nor its decision in *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148 (1964) envisages that the appealability of an order is to

be determined "in relation to an infinite variety of circumstances presented from case to case." (Respondent's Brief*, p. 2) Appellate jurisdiction is not a question which Congress has left to the courts to determine in the exercise of their "practical judgment" on a case-by-case basis. (RB, p. 2) As this Court said in *Carroll* v. *United States,* 354 U. S. 394, 405 (1957):

> "Appeal rights cannot depend on the facts of a particular case. The Congress necessarily has had to draw the jurisdictional statutes in terms of categories."

Furthermore, there is nothing "peculiar" about this case, for the small amount of respondent's individual claim and the expense of prosecuting it (RB, p. 2) are present in most alleged class actions. These same circumstances were present in all six cases in which the Courts of Appeals denied appeals from orders dismissing "class" claims. (See cases cited at pp. 14-17 of Petition for Certiorari).**

The language in *Cohen* quoted by respondent (RB, p. 3)—

> "If the right were admitted or clear and the order involved only an exercise of discretion . . . , a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."

—leads to a result contrary to the one he urges. The order of the District Court determining the non-class character of this action did not involve any right of respondent (see

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*Hereinafter cited as "RB."

**Respondent argues that three of these cases are not in conflict with the decision below, because decided prior to *Cohen* (RB, footnote at p. 13). In *Cohen,* however, this Court noted the prior existence of the collateral order doctrine. See 337 U. S. at p. 546.

discussion below), and presents no "serious or unsettled question" of law, but involves only a question of discretion in applying settled principles to particular facts. The decision of the Court of Appeals, on the other hand, presents a "serious and unsettled question" requiring this Court to exercise its power of supervision.

II

The Amendments to Rule 23

The Court below did not rest its decision on the ground that the amendments to Rule 23 had affected the question of appealability, nor did it distinguish its earlier decision in *Lipsett* v. *United States,* 359 F. 2d 956 (2d Cir. 1966) on this ground, as respondent now seeks to do. Nothing in amended Rule 23 or its history suggests that it was intended to change basic rules of appealability. The fact that absent class members may now be bound by a judgment may bear upon an action's class character, but not upon the right of appeal from a determination that the action is not maintainable as a class suit. Such a determination is not binding on, and cannot possibly be prejudicial to, absent members of the purported class, any more than was the order striking class suit allegations in *Lipsett.**

Nor do the amendments to Rule 23 confer on respondent the "right to maintain this action as a class suit . . ." (RB, p. 4) or the right to represent "his fellow class members' substantive rights" (RB, p. 12). An individual who

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*Respondent's suggestion (RB, pp. 12-13) that *Lipsett* "expressly warned against extending its doctrine to appeals under the new Rule" is plainly wrong. *Lipsett* said nothing about appealability of orders under the new Rule.

purports to represent a class does not thereby confer upon himself any additional legal right. *Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 327 (2d Cir. 1957). Rule 23 is a rule of procedure, and 28 U. S. C. § 2072 expressly provides that federal rules of procedure shall not enlarge or modify any substantive right. Nor can such rules serve to enlarge jurisdiction. *United States* v. *Sherwood,* 312 U. S. 584, 589-591 (1941).

III

Size of Attorney's Fee

The cases cited in the Petition (pp. 9-11) belie respondent's claim that petitioners' argument relating to the size of an attorney's fee in an antitrust case rests on "a single District Court decision." (RB, p. 7) While respondent claims that petitioners' argument "runs counter to the overwhelming weight of the authorities" (RB, p. 7), he cites none which hold that a fee cannot exceed a fraction of the recovery.

Respondent attempts unsuccessfully to distinguish the rule of *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939). That case held that attorney's fees could be awarded to a litigant who for practical purposes establishes the claims of future litigants similarly situated. The court controlled no "fund" in *Sprague,* as respondent asserts (RB, p. 8, footnote). On the contrary, as this Court pointed out:

> "In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of *stare decisis,* the petitioner by establishing her claim nec-

essarily established the claims of fourteen other trusts pertaining to the same bonds." 307 U. S. at page 166.

IV

Possibility of Ultimate Review

Respondent argues that even if he should prevail on his individual claim, review of the District Court's order would be "impossible or impractical" (RB, pp. 9-10).* The fact that respondent may not be able to have the District Court's order successfully reviewed at a later stage in the litigation is not relevant. There are numerous instances in which interlocutory orders are, as a practical matter, never reviewable; yet this has not been a factor in determining their finality.

As this Court so aptly put it in *Carroll* v. *United States,* 354 U. S. 394, 406 (1957):

> "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable."

*Respondent also contends (RB, p. 6) that dismissal of his appeal would result in enjoyment by petitioners of "complete immunity" for their allegedly illegal conduct. This ignores the federal authorities entrusted with enforcement of the antitrust and securities laws.

CONCLUSION

For the reasons set forth herein and in the Petition, certiorari should be granted.

Respectfully submitted,

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